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**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re EDUARDO A. et al.,
Persons Coming Under the
Juvenile Court Law.

B276528
(Los Angeles County
Super. Ct. No.
CK96042)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

EDUARDO A.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Affirmed.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Eduardo A. (father) appeals from orders denying his petition under section 388 of the Welfare and Institutions Code¹ and terminating his parental rights to sons Eduardo A., Luis A., and Victor A. We affirm.

FACTS AND PROCEDURAL HISTORY

The family came to the attention of the Department of Children and Family Services (Department) on September 26, 2012, when Victor tested positive for amphetamines shortly after birth. Thirty-three-month-old Eduardo and nineteen-month-old Luis also lived at home with mother.² Mother struggled with methamphetamine abuse. Father abused alcohol and marijuana. He rarely cared for the children, took little responsibility for them, and only visited

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

² Mother is not a party to this appeal.

every week or two. Father initially did not want to participate in services for the family, claiming the situation only involved mother and the children.

On October 23, 2012, the court ordered the children detained from the parents, placed the children into foster care, and granted weekly monitored visits to the parents. On October 29, 2012, the court sustained allegations under section 300, subdivision (b), that the children were at risk of harm because of parents' substance abuse. The court ordered both parents to participate in full drug and alcohol programming, drug testing every other week, and individual counseling to address their substance abuse issues.

The parents attended substance abuse programming, counseling sessions, and parenting classes during the first 18 months of the reunification period. Father missed about half of his scheduled drug tests. The court increased the visits to twice weekly in October 2013 and liberalized the visits to unmonitored visits with weekends and overnights in January 2014. Father did not participate in overnight visits and struggled with the children's care once unmonitored visits began. The children began exhibiting behavioral issues.

At the 18-month review hearing on May 27, 2014, the court made a home of parent-mother order. The situation quickly deteriorated after the children were placed with mother as she began abusing alcohol while caring for them.

Once the children were returned to mother's care, father skipped visits with them and told mother he wanted

to see how he could “get out of this.” Father left the children in mother’s care even when he knew she was “tipsy.”

Father’s failure to show up to visits and his unwillingness to care for the children while mother worked caused her to lose her job and her housing. In October 2014, father asked the social worker to terminate visits with the children.

The children were detained from mother’s care again on November 14, 2014, after mother left the children unattended and was arrested for public intoxication. The court ordered monitored visits for mother and unmonitored visits for father. Father resumed weekly visits and expressed an interest in having the children placed with him at his mother’s home. Father did not understand why the children were removed from mother’s care. The Department ruled out placing the children with father because his housing with his alcoholic mother was unsafe and lacked essentials for the children, a recurrent problem in the case.

The social worker told father to visit with the children at least four times per week to have the children placed with him. By January 2015, father increased his visits to twice per week. However, he was unable to care for the children, often returning the children dirty and dressed inappropriately for the weather, and relying on the foster mother to provide food for the children. The social worker had concerns about father’s ability to parent the children on a day-to-day basis as he lacked “basic common sense to care for himself, let alone three children under 5 years old.” The children enjoyed visiting with father but were not distressed

at being away from him, did not want to live with him, and lied about him being “mean” and mistreating them “to prevent [them] from living with the father.”

On January 30, 2015, the court sustained supplemental allegations under section 387 based on mother’s alcohol abuse and failure to arrange proper care for the children upon her arrest. The court terminated reunification services for both parents and gave the Department discretion to liberalize father’s visits. The children were placed with Ms. P., a former foster mother who wanted to adopt the boys.

After termination of reunification services, father continued to visit the children twice per week but struggled with their care and had a hard time managing their increasingly difficult behaviors despite continuing his parenting classes. For example, shortly after Fourth of July 2015, father returned Luis and Eduardo to their foster home with minor untreated burns caused by a neighborhood child. At times, the children saw mother during their visits with father. Because of his inability to appropriately parent the children, his visits never progressed to overnights.

Ms. P. struggled with the children’s care, in part because of their behavioral issues. Eduardo was especially difficult and aggressive. He was placed on psychotropic medications. In October 2015, the children were placed into a new foster-adopt home with Mr. and Ms. A. after Ms. P. became overwhelmed with the children’s behaviors and asked for them to be placed elsewhere. The A.’s were

Eduardo's fifth foster family, Victor's fourth, and Luis's third. The dependency case had been open for over three years by the time the children were placed with the A.'s.

The children initially struggled in their new home. Father could not handle the children's worsening behavior, once frantically calling Ms. A. when Eduardo had a tantrum during a visit. In November 2015, the court ordered father's visits monitored because of father's continued inability to manage the children. He had trouble following the new visitation guidelines and missed some visits. Ms. A., who monitored the visits, felt like she babysat father because of his inappropriateness during the visits. The children were withdrawn when seeing father, complained they did not want to visit with him, and threw tantrums before the visits.

Father filed a petition under section 388 on March 25, 2016, to return the children to his care or to reopen reunification services, claiming his consistent visits with the children, his sobriety, and his continued participation in programming and parenting classes constituted changed circumstances.³ He believed returning the children to his care was in their best interest because of their bond, consistent regular visits, and his ability to provide a nurturing home for them. The court granted a hearing on the petition.

The A.'s were proactive in obtaining services for the

³ Father previously filed a section 388 petition on May 19, 2015, and was granted a hearing on the petition, but withdrew it on the date of the hearing.

boys and, by March 25, 2016, the A.'s wanted to adopt them. On April 13, 2016, the children told the social worker they wanted to stay with the A.'s, who they called "mom" and "dad."

On May 3, 2016—over three and a half years after the dependency case began—the court held a combined hearing under sections 388 and 366.26. The children's counsel advocated for denying father's section 388 petition and for terminating his parental rights because of his inability to appropriately parent them. The court denied father's section 388 petition, finding that while father had addressed his substance abuse issues, the issues of parenting had not changed and thus "there are changes in circumstances, but not yet changed circumstances."

Father then argued that the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(1), applied and that the court should not terminate his parental rights. The court found the exception did not apply as "[i]t has to be more than just visits. It has to be the parent acting as a parent." The court terminated father's parental rights and recommended a "post-adoption contract referral."

DISCUSSION

Section 388 petition

Father contends the dependency court erroneously

denied his section 388 petition, claiming that he showed sufficient changed circumstances to warrant returning the children to his care or reopening reunification services, and that father's proposed modification was in the children's best interest. We disagree.

We review the denial of a section 388 petition for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*.) The court abuses its discretion when a decision is arbitrary, capricious, or patently absurd or exceeds the bounds of reason. (*Id.* at pp. 318–319.) To prevail on a section 388 petition, a parent must show by a preponderance of the evidence that (1) there is a change in circumstance or new evidence, and (2) the proposed modification is in the children's best interest. (§ 388; *Stephanie M.*, *supra*, 7 Cal.4th at pp. 316–317.)

“[B]est interests is a complex idea . . . a number of factors should be examined.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530.) Factors that may be considered include: “(1) the seriousness of the problem which led to the dependency, and the reason for the continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Id.* at p. 532.) However, these factors are not “meant to be exhaustive.” (*Ibid.*) “In considering whether the petitioner had made the requisite showing, the juvenile court may consider the entire factual and procedural history of the

case.” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.) A parent attempting to reopen reunification services must show how services “will advance the child’s need for permanency and stability.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*); accord, *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

The dependency court did not abuse its discretion in denying the section 388 petition. First, father did not establish any changed circumstances, providing no new information after the termination of services. He claimed his sobriety, continued participation in services, and consistent visits with the children constituted changed circumstances. However, as the court was aware, father had been participating in services and programming from the beginning of the case. Father did increase his visits with the children, but he did so before services were terminated. Father, to his credit, continued to foster a relationship with his children. However, this is insufficient for purposes of a section 388 petition to demonstrate changed circumstances.

Second, father failed to show that placing the children with him or reopening services would be in the children’s best interest. Father simply pointed to their bond fostered through visitations and his desire to provide a nurturing home. However, he did not address how his children would benefit from his request, or how it would advance the children’s need for permanency and stability. Their relationship and father’s desire to parent his children are insufficient to establish that his proposal is in their best

interest.

The evidence presented over the three and a half years of the case shows that father was neglectful and lacked basic parenting skills, to the point that he could not adequately care for the children during their brief visits. Aside from father's inadequate parenting abilities, the children's behavioral issues posed unique parenting challenges that father never addressed. He never explained how he would manage the children's behaviors if they were placed with him.

In contrast, the children quickly bonded to the A.'s, calling them "mom" and "dad." The children, now ages six, five, and three, wanted to stay with the A.'s. The A.'s were proactive in obtaining appropriate services for the children. After several different placements, the A.'s finally provided the children with a stable, nurturing home.

Father also never understood that the children could not be around substance abusers or why they were removed from mother's care. The family's substance abuse put the children at risk of harm, necessitating placing the children in foster care for over three and a half years. Father's proposal included relying on paternal grandmother, an alcoholic, for help with childcare. Despite years of services, father lacks insight into the issues facing his family; he does not understand behaviors that put his children at risk, or how to adequately and safely care for his children.

At this late stage in the dependency proceedings and after years in foster care, the children's needs and interests

outweigh the parent's interest in reunification. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) In these circumstances, denying father's section 388 was firmly within the court's discretion.

Termination of parental rights

Father next contends that the dependency court erroneously terminated his parental rights by failing to apply the beneficial parent-child relationship exception pursuant to section 366.26, subdivision (c)(1)(B)(i). We disagree.

At a section 366.26 hearing, a dependency court selects and implements a permanent plan for a dependent child, choosing one of three alternative plans: (1) adoption after terminating parental rights; (2) guardianship; or (3) long-term foster care. (§ 366.26, subd. (c)(1), (c)(4)(A).) For an adoptable child, a court must terminate parental rights and order adoption "unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

One exception to adoption is the beneficial parent-child relationship, applicable when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "The [father] has the burden of proving [his] relationship with the children would outweigh

the well-being they would gain in a permanent home with an adoptive parent.” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300 (*Noah G.*)). “It is not enough to show that the parent and child have a friendly and loving relationship.” (*J.C.*, *supra*, 226 Cal.App.4th at p. 529; accord, *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) The exception does not allow a parent to derail an adoption by showing that the child may derive some benefit from continuing with visits. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

Appellate courts have adopted different standards of review for the beneficial parent-child relationship exception, with some reviewing for abuse of discretion and others reviewing for substantial evidence. (*Noah G.*, *supra*, 247 Cal.App.4th at p. 1300.) Recently, appellate courts adopted a mixture of both standards, reviewing the existence of the relationship for substantial evidence and the application of the exception for abuse of discretion. (*Id.* at pp. 1300–1301.) We find no error under either standard of review.

Here, father failed to show that he had a parental bond with the children, let alone that the benefits of preserving his relationship with them outweigh the benefits they would gain through adoption. Father was not, and has never been, a parental figure in the children’s lives. Father stopped visiting them for a time and wanted to stop participating in the case, only expressing an interest in parenting when services were about to be terminated.

Father may have been attached to the children, but he has not shown that the children were bonded to him. The

children expressed no dismay at leaving him and instead wanted to stop the visits, throwing tantrums before seeing him. The children wanted to live with the A.'s, not father, and made up stories so that they would not have to live him. This is not the type of bond contemplated by the parental relationship exception. (See, e.g., *In re Amber M.* (2002) 103 Cal.App.4th 681, 690–691; *In re Jerome D.* (2001) 84 Cal.App.4th 1200, 1207.) Father's desire to maintain a relationship with the children is not enough to derail their adoption or overcome the children's desire to be adopted by stable parents. The dependency court did not err in terminating father's parental rights.

DISPOSITION

The orders are affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.